BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CINDY TSCHETTER	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,047,893
	)	
USD 501	)	
Self-Insured Respondent	)	
	)	

ORDER

Respondent requests review of the January 13, 2010 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery (ALJ).

ISSUES

The ALJ concluded that claimant sustained a compensable injury and was entitled to medical treatment. He went on to deny her claim for temporary total disability (TTD) as respondent provided her with full wages through its sick leave policy.[1]

The respondent agrees with the ALJ's denial of TTD but requests review of the ALJ's conclusion with respect to the underlying compensability of this claim.[2] Respondent maintains that claimant's unexplained accident while walking down steps while at work thus causing a significant ankle sprain should not be considered compensable. Respondent urges the Board to follow the Kansas Supreme Court's rationale in *Bergstrom*[3] and enforce

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[1] Neither party appeals the denial of claimant's request for TTD benefits.

[2] In addition to the issue referenced above, respondent's Application for Review indicates that respondent challenges the ALJ's conclusion that claimant suffered an accidental injury on September 22, 2009, claimant's failure to meet her burden of proof under K.S.A. 44-501(a) and "the nature and extent of [c]laimant's injury and need for treatment for her back." (Respondent's Application for Review, at 2, filed January 20, 2010). However, the only issue briefed to the Board was that relating to the underlying compensability of the claimant's ankle injury. Moreover, claimant is not requesting treatment for any back complaints at this time. (Claimant's Brief at 2 filed Mar. 4, 2010.)

[3] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

the Kansas Workers Compensation Act (Act) as written, and deny compensability for this claim inasmuch as the Act provides no coverage for "neutral" risks. Rather, only those risks that both arise "out of" and "in the course of" an employee's employment.

Claimant argues that the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member finds the ALJ's Order should be affirmed.

The facts surrounding this claim are undisputed. Claimant is employed by respondent as a physical therapist. Her office is in the basement of a building[4] and in order to receive adequate cell phone coverage and receive work-related calls, she must leave her office and go up a flight of stairs. On September 22, 2009, claimant did just that, walking up a flight of stairs to take a call. At the conclusion of the call, she was walking down the stairs towards her office and her shoe got caught on a step and she fell forward, injuring her right ankle.[5]

Treatment was initially provided but at some point, respondent denied compensability for this claim and claimant was forced to seek treatment with her personal physician through her private insurance carrier.

After hearing the parties' evidence outlined above, the ALJ concluded that "[c]laimant did suffer an accidental injury. Claimant's alleged accidental injury did arise out of and in the course of employment."[6] He ordered respondent to provide medical treatment with Dr. Iliff and Rebound Physical Therapy "until further order."[7]

Respondent appealed this decision. In its brief, respondent acknowledges that claimant sustained a fall due to a "neutral risk", but argues that the case law (which admittedly supports the ALJ's Order) is erroneous. Respondent concedes that *McCready*[8] discusses the different categories of risks and the compensability (or lack thereof) of each. Respondent frames its argument as follows:

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[4] This building is located at Tenth and Fillmore. (Claimant's Brief at 2)

[5] P.H. Trans. at 7.

[6] ALJ Order (Jan. 13, 2010).

[7] *Id.*

[8] *McCready v. Payless Shoe Source*, 41 Kan. App.2d 79, 200 P.3d 479 (2009).

> The Kansas Court of Appeals in *McCready v. Payless Shoe Source,* Kansas Court of Appeals No. 100,191 (2009), despite the causation requirement, recently ruled neutral falls were compensable. They relied on the 1979 Kansas Supreme Court decision in *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979) which held neutral risks compensable. *Hensley* established three general categories of workplace risk: (1) risks distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. [citation omitted] The Court of Appeals in *McCready* cites 1 Larson Workers Compensation Law § 7.04(1)(a) page 7-28 to 7-29 as stating "In a pure unexplained fall case, there is no way in which an award can be justified as a matter of causation theory except by a recognition that this but-for reasoning satisfies the 'arising' requirement." The *Hensley* court's ruling occurred at a time when liberal construction of the Act in favor of the workman and granting of compensation was required. [citations omitted] Now the Act is only to be liberally construed to bring parties within its coverage.
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> . . .
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> The Court of Appeals' decision in *McCready* is flawed in two respects. First, it ignores the 1993 changes to the Workers Compensation Act, including the new rule on liberal construction and that the employee is required to prove all aspects of their claim including that the injury arose out of and not just within the course of their employment. Secondly, the Supreme Court's decisions in *Casco v. Armour Swift Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007), [*reh. denied*, May 2007) and Kansas Supreme Court's decision *Bergstrom v. Spears Manufacturing Co*, No. 99,369 (2009) require a strict statutory construction of the Kansas Workers Compensation Act.[9]

Simply put, respondent is arguing that "[i]f the injury is caused by a neutral risk, by definition [using a strict constructionist view] the injury is not caused by a risk the employee is exposed to due to the employment. Such risks are not covered risks for which the employer is should be responsible."[10] Accordingly, respondent asks the Board to deviate from the well-established case law and reverse the ALJ's Order, finding claimant's accident was not compensable. This Board Member has considered respondent's invitation and declines to do so.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[11] Whether an accident arises out of and in the course of the worker's employment depends

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[9] Respondent's Brief at 3-5 (filed Feb. 15, 2010).

[10] *Id.* at 5.

[11] K.S.A. 2008 Supp. 44-501(a).

upon the facts peculiar to the particular case.[12] The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[13]

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

In *Hensley*[14], the Kansas Supreme Court categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. An injury that arises only from a personal condition of the employee, with no other factors as a cause, is not compensable.[15]

K.S.A. 2008 Supp. 44-508(d) states in part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner

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[12] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[13] *Id.* at 278.

[14] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

[15] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992); *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

> designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

The respondent acknowledges the case law which supports the ALJ's preliminary hearing Order.[16] In fact, the majority of jurisdictions compensate workers who are injured in unexplained falls upon the basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working.[17] In *Hensley*[18], the Kansas Supreme Court adopted a similar risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman (and thus not compensable); and (3) neutral risks which have no particular employment or personal character.

Here, claimant tripped on the stairs while on her employer's premises while performing her normal work duties. There was nothing unusual about the stairs or her shoes. She was, nevertheless, at work performing her job at a time and a place she was expected to be when she fell. Claimant testified that her shoe caught, but how or why it caught is largely unexplained.[19] It is uncontroverted, however, that she fell and injured herself while working for respondent on September 22, 2009. This Board Member finds that claimant's fall is the result if a neutral risk, and unexplained fall. Thus, the ALJ's conclusions that claimant sustained an accidental injury arising out of and in the course of her employment with respondent should be and is hereby affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[20] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated January 13, 2010, is affirmed.

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[16] See e.g. *McCready v. Payless Shoe Source*, 41 Kan. App.2d 79, 200 P.3d 479 (2009);*Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

[17] *1 Larson's Workers Compensation Law*, § 7.04[1] (2003).

[18] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

[19] Both parties characterize claimant's fall as a neutral risk and unexplained.

[20] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of April 2010.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Terry E. Beck, Attorney for Claimant
Larry G. Karns, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge